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TRANSMITTAL FORM (to be used for all correspondence after initial filing)	Application Number	10/551,443	
	Filing Date	September 29, 2005	
	First Named Inventor	Heinrich Eberl	
	Art Unit		
	Examiner Name		
Total Number of Pages in This Submission	21	Attorney Docket Number	101795.56306US

ENCLOSURES (check all that apply)		
<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment / Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Documents <input type="checkbox"/> Response to Missing Parts/Incomplete Application <input type="checkbox"/> Response to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input checked="" type="checkbox"/> Request for Reconsideration and Second Renewed Petition under 37 C.F.R. §1.137(b) with attached Declaration of David P. Dickerson (20 pages) <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to Group <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input type="checkbox"/> Appeal Communication to Group (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input type="checkbox"/> Other Enclosure(s) (please identify below):
RECEIVED 29 JAN 2007 Legal Staff International Division		
Remarks ATTENTION: OFFICE OF PCT LEGAL ADMINISTRATION		

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	CROWELL & MORING LLP		
Signature	<i>Gary R. Edwards</i>		
Printed Name	GARY R. EDWARDS		
Date	January 29, 2007	Reg. No.	31,824

CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below.			
Signature	<i>Kathleen M. Sweeney</i>		
Typed or printed name	Kathleen M. Sweeney	Date	January 29, 2007

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/551,443 Confirmation No. :
First Named Inventor : Heinrich Eberl
Filed : September 29, 2005
TC/A.U. :
Examiner :

Docket No. : 101795.56306US
Customer No. : 23911

Title : Device and Method for Determining the Orientation
of an Eye

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29 JAN 2007
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International Division

**REQUEST FOR RECONSIDERATION AND SECOND RENEWED
PETITION UNDER 37 C.F.R. §1.137(b)**

Mail Stop PCT
Commissioner for Patents
Office of PCT Legal Administration
P.O. Box 1450
Alexandria, VA 22313-1450

January 29, 2007

Sir:

This Request for Reconsideration and Second Renewed Petition under 37 C.F. R. §1.137(b) is submitted in response to the Decision dated November 28, 2006 by the Office of Patent Cooperation Treaty, Legal Administration, dismissing the previously filed petition under 37 C.F.R. §1.137(b). As indicated in the penultimate paragraph on page 3 of the November 28 Decision, no additional fee is due in connection with this request for reconsideration.

All of the observations, facts, and arguments set forth in the August 8, 2006 Petition are hereby incorporated in this document by reference.

For the reasons articulated in the attached Declaration of David P. Dickerson (one of the inventors, and the current proprietor of this application),

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Reply to Decision dated November 28, 2006
Attorney Docket No. 101795.56306US

Mr. Dickerson respectfully submits that at no time during the relevant period did he, or any other entity having the legal right to abandon this application, have the intention of doing so. In particular, Mr. Dickerson's attached Declaration addresses two propositions:

i) The trustee in bankruptcy for Opto-Electronic GmbH (hereinafter referred to as "Physoptics") did not have the legal right or ability under German law to effectively abandon the application; and

ii) At all relevant times, Mr. Dickerson himself, as an employee inventor and later assignee of this application without whose authority the application could not be rightfully abandoned, fully intended to prosecute it in the United States, as demonstrated by the facts set forth in the Declaration.

As explained in greater detail in Mr. Dickerson's Declaration, based on his then understanding of the requirements for filing in the United States, his failure to enter the U.S. National Stage within the 30-month period, or to file a Petition to Revive this application sooner than he did, is not indicative of an intention on his part to abandon the application. Rather, it is, as noted in the attached Declaration, the result of the convergence of a number of

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circumstances, which combined effectively to prevent his going forward with this application.

It is important to note that this petition is being filed under 37 C.F.R. §1.137(b), based on the unintentional abandonment of the application. Mr. Dickerson does not argue herein that the abandonment was "unavoidable" (although it may well have been). Accordingly, for the purpose of this petition, the relevant inquiry with regard to this application is not whether Mr. Dickerson could in fact legally have filed the necessary papers in the United States. Rather, the issue is whether his failure to do so is indicative of an intention on his part to abandon the application. While it is frequently stated that ignorance of the law is no excuse for failure to comply, in this instance, given that the issue raised by this petition relates to Mr. Dickerson's intentions regarding the application, any misunderstanding on his part (from the time when he first acquired control of the application until the time when the application was filed in the United States, together with a Petition to Revive) regarding the requirements for filing in the United States is indeed highly relevant. In fact, Mr. Dickerson has set forth in great detail in the attached declaration the circumstances, which included his ongoing efforts during the relevant period, which negate any inference that might otherwise be drawn regarding an intention on his part to abandon the application due to the length of the delay in question.

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If there are any questions regarding this response or the application in general, a telephone call to the undersigned would be appreciated since this should expedite the prosecution of the application for all concerned.

If necessary to effect a timely response, this paper should be considered as a petition for an Extension of Time sufficient to effect a timely response, and please charge any deficiency in fees or credit any overpayments to Deposit Account No. 05-1323 (Docket # 101795.56306US).

Respectfully submitted,



Gary R. Edwards

Registration No. 31,824

CROWELL & MORING LLP
Intellectual Property Group
P.O. Box 14300
Washington, DC 20044-4300
Telephone No.: (202) 624-2500
Facsimile No.: (202) 628-8844
GRE:kms
2947792_1

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/551,443 Confirmation No. :
First Named Inventor : Heinrich Eberl
Filed : September 29, 2005
TC/A.U. :
Examiner :

Docket No. : 101795.56306US
Customer No. : 23911

Title : Device and Method for Determining the Orientation
of an Eye

DECLARATION OF DAVID P. DICKERSON

Mail Stop PCT
Commissioner for Patents
Office of PCT Legal Administration
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

1. I am a citizen of the United States of America, residing at Wippenhauser Strasse 16, 85354 Freising, Germany. I make this declaration in support of the accompanying Request for Reconsideration and Second Renewed Petition to Revive the above-identified application.

2. The Decision of November 28, 2006 denying the previous petition correctly recognizes that at the end of the thirty-month period, Physoptics Opto-Electronics GmbH (hereinafter, "Physoptics") was in the control of a bankruptcy trustee. However, it is my contention, for the reasons set forth hereinafter, that the Decision does not fully take into account the implications of this fact, both practically and under applicable German law. In fact, under German law, the

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bankruptcy trustee did not have the legal right to abandon the application, and therefore could not have effectively done so.

3. Three inventors contributed to the subject matter of the present invention (hereinafter referred to simply as the invention) described in the subject application. In addition to myself, these included Roland Eberl and Heinrich Eberl.

4. At the time of the invention, Heinrich Eberl and I were employees of Physoptics, and the invention was made in the course of our employment with Physoptics, which was a German company. Accordingly, the German Employee Invention Code (German: "*Arbeitnehmererfindungsgesetz*", hereinafter "ArbEG") governs the ownership of rights to the invention. In particular, the ArbEG stipulates that the present invention is to be deemed an employee invention as regards my rights in the invention and those of Heinrich Eberl, as well.

5. At the time of the invention, Roland Eberl was the so-called "*Geschäftsführer*" (Engl: General Manager / CEO) of Physoptics. The courts have consistently held that the ArbEG, is not applicable to *Geschäftsführer*.

6. The subject application was originally filed on October 8th, 2001 as a PCT application claiming an earliest priority date of October 7th, 2000. For the purpose of seeking a patent in the US, the applicants are the inventors (on

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account of US statutes), while for the purpose of seeking a patent elsewhere Physoptics was the applicant.

7. In keeping with the courts' consistent interpretation of the ArbEG, the original filing of the application in the name of Physoptics for all countries except the US (where the application must be filed in the name(s) of the inventor(s)) is considered as constituting a tacit demand as set forth in §6, 1st paragraph of the ArbEG on the part of Physoptics for the full rights to the present invention originally held by Heinrich Eberl and me. Section 6, 1st paragraph of the ArbEG stipulates:

"Der Arbeitgeber kann eine Dienstfindung unbeschränkt oder beschränkt in Anspruch nehmen."

"The employer can demand the full or partial rights to an employee invention."

The effect of this demand is stipulated in §7, 1st paragraph of the ArbEG:

"Mit Zugang der Erklärung der unbeschränkten Inanspruchnahme gehen alle Rechte an der Dienstfindung auf den Arbeitgeber über."

"All rights to the employee invention pass to the employer upon delivery of a demand for the full rights."

The extraterritorial consequences of §7, 1st paragraph of the ArbEG are explicitly specified in §14, 1st paragraph of the ArbEG:

"Nach unbeschränkter Inanspruchnahme der Dienstfindung ist der Arbeitgeber berechtigt, diese auch im Ausland zur Erteilung anzumelden."

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"Subsequent to a demand for the full rights to the employee invention, the employer is entitled to file these for grant [of a patent] even abroad."

8. The fact that Physoptics was named applicant in lieu of Roland Eberl for all countries except the US is of considerable consequence in Germany and in the territory of the European Patent Convention (EPC). Specifically, Physoptics became the *de facto* owner of Roland Eberl's rights to the present invention in at least Germany and the territory of the EPC. Naturally, mechanisms are provided in the German Patent Code (German: "*Patentgesetz*") as well as the EPC for remedying any resulting injustice. For example, §8, first sentence, of the German Patent Code stipulates:

"Der Berechtigte, dessen Erfindung von einem Nichtberechtigten angemeldet ist, ... kann vom Patentsucher verlangen, daß ihm der Anspruch auf Erteilung des Patents abgetreten wird."

"The rightful [owner] whose invention has been filed by a non-rightful [owner] may demand from the person seeking a patent that the right to grant of a patent be assigned to him."

Similarly, Article 61(1) EPC stipulates:

"If by a final decision it is adjudged that a person referred to in Article 60, paragraph 1, other than the applicant, is entitled to the grant of a European patent, that person may, within a period of three months after the decision has become final, provided that the European patent has not yet been granted, in respect of those Contracting States designated in the European patent application in which the decision has been taken or recognised, or has to be recognised on the basis of the Protocol on Recognition annexed to this Convention:

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(a) prosecute the application as his own application in place of the applicant,

(b) file a new European patent application in respect of the same invention, or

(c) request that the application be refused."

9. Summarizing items 3 to 8 above:

- With the filing of the original PCT application relating to the present invention, Physoptics became the *de jure* global owner of all rights to the present invention originally held by Heinrich Eberl and me.

- With the filing of the original PCT application relating to the present invention, Physoptics became the *de facto*, albeit contestable owner of Roland Eberl's rights to the present invention in at least Germany and the territory of the EPC.

10. Physoptics declared bankruptcy at the end of August, 2002. Dr. Martin Prager was appointed trustee of Physoptics' assets.

11. As regards the abandonment of protective rights relating to an employee invention to which an employer has demanded the full rights, but for

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which the employer has not yet equitably compensated the inventor, § 16, second paragraph, of the ArbEG stipulates:

"Der Arbeitgeber ist berechtigt, das Recht aufzugeben, sofern der Arbeitnehmer nicht innerhalb von drei Monaten nach Zugang der Mitteilung die Übertragung des Rechts verlangt."

"The employer is entitled to abandon the right as long as the employee does not demand assignment of the right within three months of delivery of a communication [stating that the employer wishes to abandon the right]."

The courts have consistently held , by application of reverse logic to the literal stipulations of § 16, second paragraph of the ArbEG, that an employer who has yet to adequately compensate the inventor is not entitled to abandon such protective rights without at least three months' advance notice to the employee.

12. Bankruptcy on the part of the employer and/or termination of the employee's employment does not affect these stipulations of the ArbEG. The intent of the aforementioned stipulations of the ArbEG is to ensure that rights are not abandoned without the employee inventor(s) first having ample opportunity to assess their own intent to pursue those rights.

13. Prior to expiration of the thirty-month deadline with regard to the present application, I received no compensation for Physoptics' demand to my full rights to the present application. Nor had I been given any opportunity, let alone the statutory three months' advance notice, to demand (in the sense used in item 7 above re § 7, 1st paragraph of the ArbEG, albeit in the opposite direction) assignment of the rights.

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14. Therefore, although the bankruptcy trustee, Dr. Prager, had *de facto* control over Physoptics' at the end of the thirty-month deadline, under applicable German law he did not have the legal authority to allow those rights to the application to go abandoned. Accordingly, the intention of the bankruptcy trustee at the end of the thirty-month deadline is immaterial to the question of whether or not the delay in entering the US national stage was intentional. Instead, by virtue of the aforementioned stipulations of § 16, second paragraph, of the ArbEG, the only entity with the legal authority at the end of the thirty-month deadline to allow Physoptics' rights to the application to go abandoned was the collective employee inventive entity of the present application, *i.e.* Heinrich Eberl and me, collectively.

15. At end of the thirty-month deadline, and at all times before and afterward, it was my desire to prosecute the present application, and not to let it go abandoned. In fact, I took the opportunity provided by the bankruptcy trustee's overstepping of his legal authority and filed a lawsuit against Physoptics as represented by the bankruptcy trustee on May 6, 2003. Accordingly, the intentions of Heinrich Eberl at the end of the thirty-month deadline are likewise immaterial to the present petition.

16. As regards the third inventor, Roland Eberl, his actions and/or intentions have no bearing on the legal safeguard provided for in § 16, second paragraph, of the ArbEG, since he is not an employee inventor of the present application. Accordingly, Roland Eberl's intentions at the end of the thirty-

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month deadline can have no bearing on Physoptics' rights to the present application at that time, and can have no bearing on the present petition.

17. My aforementioned lawsuit against Physoptics culminated abruptly in a settlement dated November 20th, 2003 that provided me with *de facto* control over those rights to the present application previously held by Physoptics.

18. I hereinafter explain the circumstances of the delay between my acquisition of those rights to the present application previously held by Physoptics and the filing of the US national stage application.

19. Three events occurred in 2002 that were pivotal in setting the financial, professional and personal framework for the period of the delay at question. I thus consider it appropriate to begin my explanation of the delay with a discussion of these events as necessary background information. The implications thereof should be kept in mind when reading this document.

20. First, I was hospitalized on several occasions the spring and summer of 2002. It took several months until my illness was reliably diagnosed. The treatment of my illness and my rehabilitation therefrom has required a considerable investment in terms of time on a regular, for some time even daily, basis ever since.

21. Secondly, my only child was born in June of 2002, which imposed a

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substantial time requirement on my limited time resources.

22. Thirdly, my previous employer, Physoptics Opto-Electronics GmbH, unexpectedly entered bankruptcy in August 2002. Not only was I soon out of a job, I also lost considerable money as a result of Physoptics' bankruptcy. Thus, it was initially important that I personally do as much of the preparatory work relating to this application as possible.

23. Between the termination of my employment with Physoptics in November 2002 and transfer of documents on November 20th, 2003 pursuant to the settlement, I did not have access to Physoptics' files excepting those parts publicly accessible via the EPO's online file inspection services. At that time, such file inspection did not cover many documents relating to international preliminary examination under the PCT. My recollection is that I did not begin piecing together the fifteen files I acquired via the settlement until after November 20th, 2003 since I had expected to receive the entire files from the trustee and had only limited office facilities of my own.

24. Until the fall of 2006, I was of the erroneous, yet firm belief that the US national stage could not be entered on the basis of non-English application documents.

25. From the date I acquire the portfolio to the date entry into the US

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national stage was requested, I was of the belief that the technically/commercially significant applications in the portfolio I had acquired had a value of several million dollars. My belief was based on a professional valuation of Physoptics' portfolio that had been carried out in late 2001 that valued the portfolio at several tens of million dollars. This belief best reflects the strong motivation behind my firm intention to attend to the missed deadline presently in question as promptly as possible under the circumstances.

26. As a consequence of Physoptics' bankruptcy, the deadline for entering the European regional stage for all of the PCT applications in Physoptics' portfolio was extended until early January of 2004. Accordingly, I had several weeks in which to carefully deliberate which of the eight PCT applications in Physoptics' portfolio I wished to prosecute before the EPO. Of the eight, I chose to prosecute six before the EPO. Given that the costs of European and US prosecution and that the market coverage provided by US and European patents are comparable, the decisions I made re prosecution before the EPO in early 2004 reflected my intention to prosecute these same six applications before the USPTO.

27. From late November to mid-December 2003, my foremost focus was to obtain financing for prosecution of the acquired portfolio. My financing plans covered the official fees in the US and Europe as well as the costs of representation in the US for the first few years of prosecution. For the sake of

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quality more than for the sake of saving costs, my financing plans assumed that I would represent myself before the EPO and that I would prepare all necessary translations for US prosecution.

28. Until the fall of 2006, as stated above, I was of the belief that each of the six PCT applications I desired to prosecute needed to be translated into English to enter the US national stage. I myself had written all but one of those applications. In my experience, I have encountered numerous "professionally" translated applications that have lost a significant, if not decisive amount of their original disclosure during translation. For the sake of saving costs, but more predominantly for the sake of obtaining the best possible translation, it was my desire to translate the six applications myself.

29. Throughout 2004, I had only limited office facilities of my own. Most particularly, I had no office in which to work. I was thus forced to do all personal paperwork in the living room of my small apartment, which was also occupied by my wife and two year old son.

30. In January 2004, I was urgently busy gathering and documenting the necessary materials for my 2002 German tax return. This task had been overly delayed due to the failure/inability of the person who manages our apartment house to prepare a correct balance for 2002. In the end, my co-owners and I had to seek third party assistance.

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31. In early 2004, I was further set back in that my weekends and evenings were also partially dedicated to studying for the so-called "European Qualifying Exam" (EQE) for admittance to the EPO bar that I took in March 2004. Since the EQE is only offered once a year, failure to appropriately study for and take the exam would have evoked reprimand from my employer.

32. Throughout 2004, yet particularly in the first half of 2004, I was aggravatingly bogged down with paperwork in conjunction with a complex, multilateral legal battle over responsibility for hefty water damage to several rooms of my (and others') apartment(s) from the building's drain system.

33. In May 2004, I was sick for several weeks.

34. In April 2004, I unexpectedly inherited a small sum from a relative in the US. Since it was apparent that these funds could be useful for covering future USPTO fees as well as some of the costs of representation in the US, I decided it would be wise to open a US bank account, if not also for the sake of easing such payments. This endeavor lasted from early June 2004 to mid-August 2004 and generated considerable paperwork. In fact, I did not receive the necessary account documents such as check and deposit slips until late September 2004 and it was not until October 2004 that money was actually in the account.

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35. In the latter half of 2004, as it became apparent that my ability to work at home was not commensurate with the rapidly growing amount of portfolio-related paperwork I had to tackle, I began searching for affordable office space near home as well as for the necessary office equipment and furnishings. I was able to conclude a lease in late November 2004 and spent an unpleasant proportion of my Christmas holidays ironing out the quirks inherent to modern office equipment.

36. On November 10th, 2004, in the midst of my search for office space/equipment, I first wrote to my present US patent attorney, Gary Edwards, briefly elucidating my situation and inquiring re representation. By this time, my financial situation was slowly, but surely improving to the point where I felt comfortable, at least from a financial point of view, engaging a third party translator for translating the PCT applications for US prosecution. I received a reply from my U.S. attorney on November 24, 2004 that requested more detailed information.

37. Having an office greatly increased my productivity. Nonetheless, a considerable backload had already grown. In addition to the "normal" paperwork that one has, prosecution of the six Euro-PCT applications was in full swing. In first three months of 2005, I was further set back in that my weekends and evenings were also partially dedicated to studying for a re-sit of the EQE.

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38. On February 13th, 2005, I replied to my attorney's inquiry with a detailed, 13 page summary providing a basis for assessing whether representation could provoke a conflict of interest, elucidating the complex ownership problems and asking what we would need to enter the US national stage.

On February 26th, 2005, my attorney tentatively agreed to take over representation. His reply did not detail the minimum requirements for entering the US national stage or answer my question of February 13th, 2005.

39. Roughly one month after the EQE, on April 17, 2005, I provided my attorney with what I believed to be the requisite materials and instructions for entering the US national stage as regards PCT/EP01/11634 (15). The documents for PCT/EP01/11633 (14) and PCT/EP02/04030 (16) as well as revised claims for PCT/EP01/11634 (15) followed on April 24, 2005. The documents for PCT/EP00/09843 (7) followed on April 25, 2005. Since it had been agreed that my attorney would arrange for translation, the majority of the aforementioned documents were in German. While it may appear that the documents were swiftly and easily prepared, such assessment is not correct. The near simultaneous mailing was a result of my pooling of like tasks for the sake of efficiency.

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40. In June 2005, my son turned 3. Under German law, a woman who has taken maternity leave must return to work no later than the child's third birthday or forfeit her previous position. As I result, I was responsible for my son every Friday from June 2005 until his kindergarten began in September 2005.

41. In July and August 2005, my thoughts and energy were strongly focussed on my rapidly deteriorating employment situation. Mismanagement had created a critical backload of files bound by official and client deadlines.

42. In September 2005, I spent considerable time providing my US tax advisor with the requisite paperwork for preparing my overdue 2003 and 2004 US tax returns.

43. On October 3rd, 2005, I provided my attorney with the requisite documents for PCT/EP00/09840 (8) and PCT/EP00/09841 (9). Again, the majority of these documents were in German.

44. I believe that the above summary of the major events in my personal life between 2002 and my provision of the last of what I believed to be the requisite documents for entering the US national stage on September 29, 2005 sufficiently documents that the delay was not intentional, but was instead the result of the circumstances, including my living situation, my health situation and a strict budget.

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45. At no time has it ever been my intention to abandon this application. In fact, on the contrary, it was and has always been my steadfast determination to prosecute this application in the United States.

46. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that wilful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such wilful false statements may jeopardize the validity of the present patent application or any patent issued thereon.

David P. Dickerson

Date: January 29th, 2007

D. P. Dickerson

*** RX REPORT ***

RECEPTION OK

TX/RX NO	7345
RECIPIENT ADDRESS	
DESTINATION ID	
ST. TIME	01/29 17:52
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RESULT	OK